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No. 06-1210

IN THE

Supreme Court of the United States

GENERAL ELECTRIC COMPANY,
Petitioner,

v.

COMMISSIONER, NEW HAMPSHIRE
DEPARTMENT OF REVENUE ADMINISTRATION,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Hampshire

PETITIONER'S REPLY TO RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION

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After this Court invited the Solicitor General to express the views of the United States in this case, *General Electric Company* v. *Commissioner, New Hampshire Department of Revenue Administration*, No. 06-1210, Order of May 21, 2007, New Hampshire repealed, effective August 17, 2007, the statute that denied petitioner the right to a

dividends received deduction (DRD) for dividends received from its foreign subsidiaries, because the foreign subsidiaries did not conduct income-producing activity in New Hampshire. New Hampshire has now filed a supplemental brief arguing that the statute's repeal "[d]emonstrat[es] that this Case is a Hypothetical and does not Warrant Certiorari Review." Resp. Supp. Br. Opp. 2. Respondent's eleventh-hour effort to avoid this Court's review lacks substance.

ARGUMENT

I. THE REPEAL OF NEW HAMPSHIRE'S DRD STATUTE HAS NO IMPACT ON THE PROSPECTIVE TREATMENT OF DIVIDENDS IN NEW HAMPSHIRE AND THEREFORE DOES NOT LIMIT THE SIGNIFICANCE OF THIS CASE

The repeal of New Hampshire's DRD statute does not affect the continuing significance of the issues raised by this case. Because the DRD statute simply implements a state constitutional bar against double taxation, a point the New Hampshire Supreme Court has consistently recognized, the state constitutional mandate produces the same discriminatory treatment of foreign subsidiary dividends as the recently repealed statute. As the New Hampshire court declared in *First Financial Group of New Hampshire, Inc. v. State*, 430 A.2d 162 (N.H. 1981):

> In *Concord Inv. Corp. v. N.H. Tax Comm'n*, 114 N.H. at 109, 316 A.2d at 195, we stated that when a wholly-owned subsidiary pays a business profits tax and then passes those post-tax profits through to its parent in the form of dividends, the parent will not be required to pay a business profits tax on the dividends. This is so not only because RSA 77-A:4 [the DRD statute] precludes such a result, *but, more*

> *importantly, because "[t]he incidence of the two taxes would be so nearly identical as to result in double taxation of a sort which is not permitted under our Constitution." Concord Inv. Corp. v. N.H. Tax Comm'n*, 114 N.H. at 109, 316 A.2d at 195 (quoting *Opinion of the Justices*, 84 N.H. 559, 577, 149 A. 321, 330 (1930)).

430 A.2d at 165 (emphasis supplied).

Accordingly, the same issue raised by the decision below arises even in the absence of a statutory provision granting a DRD limited to dividends received from foreign subsidiaries doing business and generating taxable income in New Hampshire. Thus, *regardless of any statutory provision for a DRD*, "when a wholly-owned subsidiary pays a business profits tax and then passes those post-tax profits through to its parent in the form of dividends, the parent will not be required to pay a business profits tax on those dividends." *First Financial Group*, 430 A.2d at 165. Indeed, respondent itself effectively acknowledges this conclusion in declaring that "*the harm that [the repealed statute] was intended to protect against, the threat of double taxation, is addressed through ... state case law....*" Resp. Supp. Br. Opp. 3 (emphasis applied). This constitutional requirement for a DRD has continuing force in all situations where the New Hampshire Business Profits Tax statute requires a dividend-paying subsidiary to file a separate tax return, as in this case where the statute requires the foreign subsidiary to file a separate return. RSA 77-A:1, XIV.

Based on controlling state constitutional law, GE would therefore make the same argument that it has made throughout this case, namely, that if GE's foreign subsidiaries had been doing some business in New Hampshire, GE would not have been required to pay a tax on some portion of the dividends received from those

subsidiaries. However, because GE's subsidiaries do business only abroad, GE is not entitled to a deduction or exemption with respect to *any portion* of the dividends it receives from its foreign subsidiaries. That differential treatment constitutes discrimination against foreign commerce in violation of the Commerce Clause.

In short, the discriminatory treatment of dividends paid by foreign corporations not doing business in New Hampshire, along with the conflict between the decisions of the highest courts of New Hampshire and North Dakota, will continue unabated if the decision below is permitted to stand, notwithstanding the last minute repeal of the statute.

II. THIS CASE IS NOT "A HYPOTHETICAL"

Respondent's contention that the *prospective* repeal of New Hampshire's DRD statute renders this case "a Hypothetical" (Resp. Supp. Br. Opp. 2) is baseless. The statute was indisputably in force during the ten tax years at issue (1990-1999). Respondent has admitted "the Foreign Dividend Issue exists and applies to GE in each of the Tax Years." See Pet. App. 52a, 61a (petitioner's complaint ¶ 11 and respondent's unqualified admission thereto). Respondent has further admitted that "[p]ursuant to the Settlement Agreements, the parties have agreed and stipulated that if the Foreign Dividend Issue is resolved in GE's favor, the Department will pay a refund to GE with respect to all of the Tax Years in the aggregate amount of $3,154,738." *Id.* In short, the parties themselves have agreed that GE suffered real harm in this case and have gone so far as to quantify the precise amount of such harm. There is nothing about the prospective repeal of New Hampshire's DRD statute that renders this harm hypothetical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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